


<b>Office of the Comptroller</b> <b>One Ashburton Place</b> <b>9<sup>th</sup> Floor</b> <b>Boston, MA 02108</b>	<b>Commonwealth of</b>  <b>Massachusetts</b>	<b>Operational Services Division</b> <b>One Ashburton Place</b> <b>10<sup>th</sup> Floor</b> <b>Boston, MA 02108</b>
<b>Joint Policy:</b>	<b>Procurement/Contracts</b>	
<b>Issue Date:</b>	<b>July 1, 2004</b>	
<b>Date Last Revised:</b>	<b>November 1, 2006. See <a href="#">Revisions</a> for details.</b>	

## **Amendments, Suspensions or Terminations**

### **Executive Summary**

This policy is jointly issued by the Office of the Comptroller (CTR) and the Operational Services Division (OSD) for contracts under the jurisdiction of each of these departments.

Effective contract management requires a Department to monitor contractor performance and compliance. Significant changes in performance, funding or obligations must be memorialized, contemporaneously with the change, in a formal contract amendment. At least six months prior to the termination of a procurement Departments should review any remaining available options to renew or begin a new procurement process if the performance, program etc. will be ongoing.

The "*Standard Contract Amendment Form*" or other prescribed amendment form must be used to document all amendments to a Contract including exercising an option to renew, extending the period of performance, changing the scope of performance, changing costs, etc., in accordance with the solicitation. An amendment must be signed by the Department and the Contractor prior to the termination date listed in the Contract or as amended. Departments must attach all relevant documentation to support the amendment.

In addition to the policies in this Chapter, departments are also responsible for the policies in [Contracts - State Finance Law and General Requirements](#) and any other applicable [contract and procurement policies](#) issued by CTR and OSD under the [Procurement Information Center \(PIC\)](#).

### **Considerations**

Contract amendments must be made with the same care and attention to detail as the original contract. Special consideration must be made to whether the amendment is allowable under the original procurement or contract, the timing of when an amendment is needed, and the formal documentation that will be needed for the amendment.

All state finance rules apply equally to amendments and an amendment that increases the obligation for the Commonwealth will be subject to appropriation of available funds and other funding rules. If an amendment changes the dates, amounts, or any information in the original MMARS encumbrance document, a modifying document will also have to be done contemporaneously with the execution of the amendment and processed in MMARS. In all cases departments will be held to a standard of good faith and fair dealing with contractors when making amendments, suspensions or terminations.

### **List of Topics in this Chapter**

<a href="#">Establish Communication with Appropriate Staff</a>	<a href="#">When is a Contract Amendment Needed?</a>
	<a href="#">What can be amended?</a>
<a href="#">Consider "Reasons" for Terminations, Suspensions or Amendments.</a>	<a href="#">State finance law applies to amendments</a>
<a href="#">Review Termination, Suspension or Amendment Terms</a>	<a href="#">Amendment to Contract Dollars and/or Duration</a>
<a href="#">Consider "Costs" of Termination or Amendments</a>	<a href="#">Amendments to Contract Performance</a>
<a href="#">Department's Actions Must be Fair</a>	<a href="#">Amendment to Contract Duration Only</a>
<a href="#">Contract Disputes</a>	<a href="#">Changes to Informational Items or Accounting Information</a>
<a href="#">Litigation or Mediation</a>	<a href="#">Exercising Options to Renew</a>
<a href="#">The Office of the Attorney General (AGO)</a>	
<a href="#">Breach of Contract</a>	<a href="#">Legal Name or Legal Address Change Only</a>
<a href="#">When and How To Suspend or Terminate a Contract</a>	<a href="#">Process for Documenting Amendments</a>
<a href="#">Immediate Suspension or Termination</a>	<a href="#">Guidelines On Material Changes In Contractor's Identity</a>
<a href="#">Immediate Termination For Emergency</a>	<a href="#">Merger, Buyout Or Consolidation</a>
<a href="#">Immediate Termination for Lack of Funding</a>	<a href="#">Contract Options with a Material Change</a>
<a href="#">TELPs and other mandatory payment commitments</a>	<a href="#">Contract Assignment</a>
<a href="#">Reduction in Funding or Allotments</a>	<a href="#">Evaluating the Impact of a Material Change</a>
<a href="#">Suspension/Termination for Cause</a>	<a href="#">Administrative Process for a Material Change</a>
<a href="#">Termination Without Cause</a>	<a href="#">Required Documentation for Material Change</a>
<a href="#">Internal Controls</a>	<a href="#">Other Types of Contractor Changes</a>
<a href="#">Records Management</a>	<a href="#">Terminated Contracts May Not Be Amended</a>
<a href="#">Information Sources</a>	<a href="#">Thirty day Extension</a>
	<a href="#">Performance outside scope of contract document</a>
	<a href="#">Settlements and Prior Year Deficiencies</a>
	<a href="#">Assignment of Payments</a>

## **Policy**

**Comm-PASS:** Throughout this document, certain "Comm-PASS" procedures are referenced, as appropriate. Comm-PASS stands for the **Commonwealth Procurement Access and Solicitation System** and is the online system for posting procurement and contract information. These references are intended to let departments know that certain Comm-PASS actions are either required or available rather than provide instruction for using Comm-PASS. Detailed "how to" instructions are available in the associated guidance entitled Comm-PASS Policies, available via a link at the end of this document. See [Comm-PASS](#) and [Comm-PASS Policies](#).

**Purchase of Service:** Also, a notation of "*For POS Only*" indicates that the text that follows pertains only to the "Purchase of Service" system and the procurement of human and social services.

## **Recommendations and Considerations for Terminating, Suspending or Amending Contracts**

The following are recommendations and considerations to review when considering amending, terminating or suspending a contract(s). These are by no mean exhaustive. Departments should consult with their CFO and Legal Counsel prior to any formal action to amend, suspend or terminate a contract.

## **Establish Communication with Appropriate Staff**

Make proactive efforts to routinely communicate with fiscal, contract and program staff. CTR Internal Controls guidance recommends the participation of both the Legal Staff and the Chief Fiscal Officer as the key staff responsible for ensuring fiscal responsibility. Internal department policies should encourage legal staff consultation prior to implementing any action to terminate, suspend, reduce or amend a contract, especial during time of fiscal constraints. Program and fiscal staff may not understand the limitations or implications of certain terminations, reductions, suspensions or amendments and legal staff should be included in discussions when these actions are anticipated.

The Attorney General's Office should also be consulted regarding any anticipated termination, reduction, suspension or amendment which may involve a potential threat of litigation, or which is foreseen to involve a current or potential dispute or difficulty.

The Office of the Comptroller (Legal Bureau) should be contacted whenever it is anticipated that a Department may be faced with insufficient funds for contract, payroll or other fiscal obligations. In addition to any notices of deficiency required to be made to ANF, and the House and Senate Committees on Ways and Means, the comptroller must be contacted prior to any actions if the department is considering termination of a lease or TELP due to lack of funding.

OSD should be contacted whenever departments have questions related to whether an amendment falls within the scope of the RFR procurement under 801 CMR 21.00.

**Carefully Consider the "Reasons" for Terminations, Suspensions or Amendments.**

If a termination or suspension is "for cause", the department must be able to document the "for cause" events or actions supporting this type of termination, that the performance requirements were clearly outlined in the contract and that the Contractor was, or will be provided with a reasonable opportunity to cure.

Without cause terminations should provide a reasonable notice of termination for the type of performance sought, or as specified in the contract. See [Termination without Cause](#) section below.

Terminations, suspensions or reductions due to the elimination or reduction of appropriation or allotments should be carefully reviewed in relation to the Department's published mission, priorities other legal obligations and available funding. Departments should define critical business needs and priorities that are considered when contract modifications are necessary due to decreased or eliminated funding.

**Carefully Review Termination, Suspension or Amendment Terms**

Termination, suspension and amendment language is contained in the Contract, which includes the contract boilerplate, language in the procurement document and any additional negotiated terms and conditions.

A Department's ability to amend, reduce, suspend or terminate a contract or modify contract performance is determined by the terms contained in the contract, the type of performance required, governing statutes and appropriation language. State and federal mandates to provide health and safety services to citizens, services to clients in residence, etc. may also limit a Department's ability to terminate or reduce certain contracts. Other contracts have performance that is not capable of being reduced or divided, which may also limit a Department's ability to reduce or terminate a contract.

It is recommended that contracts contain language informing Contractors that the contract creates no entitlement or guaranteed funding and is subject to completion and acceptance of performance by the Department. In addition, contract performance requirements are subject to the Department's needs that are based upon mandates, funding appropriation and allotments, which may change with changes in law, or budget and allotment reductions.

In the event the Department is faced with a budget reduction, elimination or substantial change in circumstances warranting a change in contract need or performance, the Department should make best efforts to negotiate an amendment to reduce performance, prior to having to terminate or suspend a contract. However, in some cases of severe budget cuts, allotment reductions, or agency funding eliminations, a Department will have no choice but to terminate, reduce or suspend existing contracts. To provide further protection, any contract which has performance which can be broken into phases, or is divisible and capable of being reduced should include language allowing the Department to require a

reduction in performance and corresponding maximum obligation in the event of a budget or allotment reduction.

A contract termination is a permanent cancellation of the contract and should be used only in situations when the Department does not foresee continuing business with a Contractor.

A contract suspension is appropriate for multi-fiscal year contracts requiring a temporary halt to performance (for a period of days, weeks, months, on a certain date or upon completion of a specific amount of performance) with anticipated continued performance at a future date. A suspension is preferable to a termination if funding is anticipated to be made available at a later date because this places all the contract documentation into a "suspended" status or "on hold" and when funding becomes available, the contract documentation can be easily "reactivated" through a contract amendment, rather than a full contract execution with all contract attachments.

For contract suspensions, the notice of suspension should identify whether the amount of the reduction for the period of the suspension will be deducted from the overall maximum obligation of the Contract, or moved into subsequent fiscal years of the Contract.

### **Consider the "Costs" of Termination, Amendments or Reductions**

Unless otherwise specified in the Contract, the Department is responsible for compensating for reasonable performance requested, received and accepted until the contract termination or amendment date. Departments may not request or accept performance or otherwise incur obligations in excess of Department appropriations and allotments (See M.G.L. c. 29, § 26 and § 27) or outside the scope of a contract.

Certain contracts can be easily terminated without additional costs, since the Department is purchasing services or commodities on an "as needed" basis. Other contracts may require compensation or liquidated damages for the Contractor for an early termination or reduction. Such contracts include those with an anticipated long term commitment, or which require the Contractor to make an up front commitment of time or funding, or to incur additional obligations in order to complete performance, such as renting space, hiring personnel, purchasing equipment or materials. Therefore, the Department needs to factor in these obligations when considering the associated "costs" of termination for the Contractor and the Commonwealth.

Some contracts may not be terminated without severe penalties. Please see TELP section above. Other contracts trigger substantial penalties if the Commonwealth terminates when there has been no breach by the Contractor. Therefore, departments should be careful both when negotiating potential penalties for early termination, and when making the determination to terminate a contract if penalty clauses have been negotiated. These obligations may not necessarily be waived if the department's funding is reduced or even eliminated, but may remain outstanding liabilities against the Commonwealth that the contractor may litigate to enforce.

### **Department's Actions Must be Fair and Demonstrate Good Faith and Fair Dealing - Notice of Termination, Suspension or Amendment**

Departments must demonstrate good faith and fair dealing when initiating any notice of termination, suspension or amendment. Departments must be able to demonstrate that there exists a good business justification or legal necessity that supports the contract change. Department actions that support its legislative mandate, support a good business justification or need, or are required out of legal necessity (such as a reduction required due to budget cuts) are generally given substantial deference provided the department deals with affected contractors in good faith.

Notices of termination, suspension or amendments are usually in the form of a letter distributed to the Contractor(s). Notice of termination must be reasonable and in accordance with any notice provisions

agreed to as part of the contract. If no notice period is specified in the contract a reasonable period for without cause termination or suspension is usually not less than 30 days, depending upon the complexity of the contract. Human and Social Service Contracts require a longer notice period. More complex procurements or contracts requiring a substantial up front investment by a contractor usually warrant a longer without cause notice period.

Any notice provided to a contractor should be made by an authorized signatory of the department head in consultation with the CFO and department legal counsel.

Any notice shall be deemed delivered and received when submitted in writing in person or when delivered by any other appropriate method evidencing actual receipt by the Department or the Contractor. See contract for details. The *Standard Contract Form* allows email delivery to listed Contract Manager provided there is confirmation of actual receipt.

Most written notices of termination or suspension delivered to the Contractor should state:

1. the effective date and period of the notice,
2. the reasons for the termination or suspension, if applicable,
3. any alleged breach or failure to perform,
4. a reasonable period to cure any alleged breach or failure to perform, if applicable, and
5. any instructions or restrictions concerning allowable activities, costs or expenditures by the Contractor during the notice period.

The content of the notice is usually prescribed in the Contract. For example, in the *Commonwealth Terms and Conditions* the following language appears:

*"Any written notice of termination or suspension delivered to the Contractor shall state the effective date and period of the notice, the reasons for the termination or suspension, if applicable, any alleged breach or failure to perform, a reasonable period to cure any alleged breach or failure to perform, if applicable, and any instructions or restrictions concerning allowable activities, costs or expenditures by the Contractor during the notice period."*

For all notices, Department must document a Contractor's actual receipt of notice. (Please see notice receipt requirements in Commonwealth Terms and Conditions, the Commonwealth Procurement Policies and Procedures Handbook, and *Standard Contract Form* Instructions). Notice may be made orally, but written notice must be provided in the format authorized under the contract, provided that actual receipt is confirmed. For the purposes of time periods for notice, the time clock does not begin to tick until actual receipt of notice by the contractor.

For Contracts using the *Standard Contract Form* and Instructions, the "Contract Manager" is the person to receive notices unless otherwise specified in the Contract:

*"Unless otherwise specified in the Contract, legal notice sent or received by the Contractor's Contract Manager (with confirmation of actual receipt) through the listed fax number(s) or electronic mail address will meet any requirements for written notice under the Contract".*

For other types of Contracts (construction, leases, etc.) departments should carefully review the language for the person and form of receipt of notice that is required.

## **Contract Disputes**

In most cases, contract disputes or conflicts arise due to miscommunication, misunderstandings, or lack of accurate or timely information. Enhanced communication and careful monitoring of contract performance can usually resolve most disputes. Departments are encouraged to develop internal methods for resolving disputes.

Sometimes, contractors and department staff develop close working relationships which encourage informal resolution outside the terms of the contract. Such resolutions, although efficient in the short term, create a dangerous precedent in the event of larger disputes or a serious breach in performance. Staff must understand that, irrespective of their professional working relationships with contractors, they have been entrusted with an independent fiduciary obligation to manage Commonwealth funds properly in accordance with the terms of the contract. This responsibility includes knowing the terms of the contract and providing prompt notice to the CFO, other appropriate department staff and the contractor whenever performance is disputed.

Failing to provide prompt and suitable notice may result in escalation of a bad situation, additional costs to the department, and delays in performance. However, under Section 12. Waivers in the Commonwealth Terms and Conditions, “...***forbearance or indulgence in any form or manner by a party shall not be construed as a waiver, nor in any way limit the legal or equitable remedies available to that party. No waiver by either party of any default or breach shall constitute a waiver of any subsequent default or breach.***” Just because a department accepts less than full or satisfactory performance at any point in the contract does not waive the department’s right to demand full or satisfactory performance during the remainder of the contract.

## **Litigation or Mediation**

Litigation has traditionally been the first line of attack when departments have been faced with a contract dispute which has reached an impasse. However, litigation is expensive for both the Commonwealth and a contractor and may exceed the value of resolving the dispute. Departments may consider “mediation” as a less expensive, quicker and often less contentious way of resolving a contract dispute, and as a means of arriving at a creative solution not available in court.

Mediation uses a neutral third-party to work with the parties to develop a mutually agreeable solution to the dispute. Participation is voluntary and the results are binding by mutual agreement of the parties. ANF, OSD and the Attorney General’s Office support the use of mediation as an alternative form of dispute resolution. Mediation supports procurement principles and balances the Commonwealth’s interest in litigating important legal rights that affect the Commonwealth while preserving Commonwealth funds and providing a more effective and efficient alternative to court.

**Note: Mediation does not include arbitration. Arbitration may not be pursued or included in any contract as a method of dispute resolution.**

The Massachusetts Office of Dispute Resolution (MODR) has been designated as the lead agency for overseeing the use of mediation by state departments and other forms of alternative dispute resolution. MODR has established a contract that may be used by all state and private entities per MODR’s enabling statute M.G.L. c. 75, s. 46. The contract offers qualified mediators with expertise in a wide range of substantive areas. Departments must contact MODR if they are considering mediation and may not separately procure these services. Private sector mediators under this contract have been selected and trained by MODR. Thus, the mediators are not employees of MODR or the department and they act independently as impartial mediators on behalf of both the department and the contractor to reach a solution.

A department and the contractor who agree to pursue mediation are expected to share the costs of a mediation. For more information about mediation, dispute resolution systems design, facilitation and consensus-building, dispute resolution skills training, and other services offered by MODR, call (617) 287-4040.

### **The Office of the Attorney General (AGO)**

As the Commonwealth's litigator pursuant to M.G.L. c. 12, the Attorney General's Office (AGO) balances a variety of concerns that go beyond the scope of a particular dispute that may determine whether a contract dispute should be litigated or mediated. For example, some disputes may involve the development of legal precedents which have far reaching implications for other departments. The presence of such issues is not necessarily linked to the monetary size of the dispute. A small dollar dispute may involve issues with broad implications, while a large dollar dispute may not.

The AGO represents departments only in disputes involving litigation and will not represent a department during a mediation or other administrative proceeding or hearing.

The AGO MUST be informed immediately whenever potential litigation may be involved or is threatened by a contractor or bidder, whenever the department believes that a dispute has reached an impasse that might be resolved through mediation or whenever a serious contract issue or public interest has been threatened warranting litigation. The AGO must review these disputes to determine whether the AGO can or will represent the department and whether the matter should be litigated or mediated or otherwise resolved. Consequently, departments must obtain the approval of the AGO before agreeing to mediation or any contract dispute.

The cost of mediation should not be a deterrent to using this method of dispute resolution and opting for the AGO pursue litigation. Although mediation has an immediate cost at the time of the hearing, litigation is not a cost-free method of contract dispute resolution. Although the department will not be charged for legal services provided by the AGO the department will usually be responsible for fees associated with expert witnesses, sheriffs' fees for service of process, deposition fees and the staff time and resources necessary to prepare and testify at depositions and trial if the litigation is not immediately resolved. Therefore, in the long run, mediation is usually more cost effective and less time consuming than litigation.

Fiscal Staff should be instructed that they have an obligation to notify their General Counsel immediately whenever a potential contract dispute arises that may trigger the need for intervention, alternative dispute resolution, or that may potentially result in litigation. The Department General Counsel is the key contact with the AGO and should contact the Attorney General's Trial Division, 200 Portland Street Boston, Massachusetts 02114, (617) 727-2200; FAX: (617) 727-3076 for further assistance with approvals for mediation or to refer potential contract dispute litigation.

### **Breach of Contract**

A breach of contract is generally considered a "violation" of the contract terms and conditions or a "default" or "failure to perform." A breach is "material" if the contractor violates a major requirement of the contract, e.g., transfer of performance to a subcontractor without department prior approval, lapse in Worker's Compensation or other mandatory insurance, or the contractor defaults on performance of a significant stated requirement of the contract, e.g., failure to deliver test packages on the day of the test as required, failure to submit mandatory programmatic or fiscal reports.

The contract language determines the basic parameters within which a department may terminate or suspend contract performance or payments. This is where the time spent drafting the RFR can really

assist a department. If the contract terms and conditions of performance are clear, complete and detailed, then the department will have an easier time determining when a breach or default has occurred.

Performance measurements are also helpful in determining breach or default. If a department has clearly specified how performance will be judged and what the expected standard of performance is, the contractor may be held to that standard. If no performance standards are identified, and no performance deadlines or thresholds are set, it is harder to argue that the contractor breached or defaulted on the contract. Procuring departments are advised that oral agreements, oral amendments or conversations are almost always deemed unenforceable.

If performance is **in any way** substandard or incomplete and a department believes there has been a full or partial breach, the department contract manager is responsible for taking the following steps:

1. Immediately notify the CFO, department legal counsel and/or other appropriate staff in accordance with internal protocol.
2. If a legal dispute or litigation is threatened, the department is required to immediately notify the Office of the Attorney General (Government Bureau).
3. Document the breach (if not done already). The breach must be documented and verifiable. If a breach or incomplete performance cannot be documented or verified or if the department fails to document or verify the breach, there is a weaker basis for forfeiting a retainage, suspending or terminating performance or the contract.
4. Documentation should be verified by more than one individual, preferably by the CFO, in consultation with legal counsel, to ensure that a claim of breach or incomplete performance is justified under the terms of the contract and reasonable. Sometimes, staff have performance expectations that are not memorialized in the contract terms and, therefore, the failure to meet these unwritten expectations cannot be used as a basis for forfeiture of a retainage, suspension or termination of contract performance.
5. Draft written notice of breach or notice of rejection of substandard or incomplete performance, specifically identifying the reason(s) for the rejection and what is necessary to cure the breach. The notice must be professional, impartial and must match the level of the breach. The notice should contain any time period for cure and the repercussions for failure to timely cure (i.e., suspension, termination, replacement).
6. Provide notice to the contractor (see Contract terms for period of notice if specified).
7. If the breach is resolved, release the portion of periodic or final payments (and retainage if applicable) owed for the completed performance.

#### **Contract Suspension and Termination - When and How To Suspend or Terminate a Contract**

When suspension or termination takes place prior to the expiration date specified in the contract, the party initiating the action must provide prior written notice to the other party. Given the seriousness of contract suspension or termination, the department taking the action should take steps to obtain documentation ensuring proof of the basis for the termination or suspension and that the notice was delivered to the contractor. Departments should include evidence of actual delivery of notice in the procurement/contract file.

Departments are strongly encouraged to review any anticipated suspension or termination actions with legal staff and their CFO prior to taking any action. Department legal staff may also contact the Attorney General's Office Trial Division if the planned termination or suspension involves potential litigation. This is especially important when a procuring department wants to suspend or terminate a contract used by other departments (such as a Statewide Contract or Master Agreement used by multiple departments), since this action will have repercussions for more than just the procuring department. Also, legal staff and OSD may be able to suggest other solutions, such as mediation or contract negotiation, which may resolve the issues and forestall termination or suspension.



Departments should be aware that procurement file contents are generally subject to public disclosure under the public records law, and if litigation results from the action to terminate or suspend, the procurement file contents may also be subject to legal discovery. Therefore, notes, memos and documents concerning suspension or termination should accurately reflect the facts and circumstances of the department's actions.

There are three types of contract suspension or termination:

Immediate suspension or termination

Suspension or termination for cause

Termination or suspension without cause

Departments should refer to the applicable contract type to determine any specific standards for the timing and other procedural requirements regarding contract suspension or termination. It is important to note that there are specific differences between the two versions of the Commonwealth Terms and Conditions with regard to the basis for termination, required notice period and obligations upon termination. Furthermore, the rights of the parties as expressed in the applicable Terms and Conditions are not exclusive, but are in addition to any other rights and privileges the parties may have under operation of law or as otherwise negotiated as part of the contract. Therefore, it is vital to contact department legal staff for assistance in this area.

### **Immediate Suspension or Termination**

A contract may be suspended or terminated immediately upon receipt of written notice in certain limited circumstances, including unforeseen emergencies that require immediate department action or elimination or absence of funding.

### **Immediate Termination for Emergency**

A termination or suspension for an emergency is limited to a rare unforeseen public emergency that mandates immediate department action to address an acute public health or safety incident. This circumstance may arise due to a death, assault or injury to a Commonwealth client or employee in connection with a contractor's performance, or a public emergency (flood, fire, hurricane) having no connection with a contractor's performance. Departments should try to notify any contractor whose performance may be affected by an emergency. Depending upon the severity or duration of the emergency a department may either temporarily suspend performance or payments or may terminate the contract upon prior written notice to the contractor.

### **Immediate Termination for Lack of Funding or Appropriation**

Although contract payments are "subject to appropriation" by the legislature and "allotment" by the Governor (M.G.L. c. 29, § 27) a department may not escape contractual obligations through immediate contract termination (especially contracts for term leases, space leases, tax exempt lease purchase (TELP) or other long term commitments) unless the appropriation or allotment under the account funding the contract, or the specific language that authorizes the funding of that contract, is eliminated and the department has no other available funds that could be unobligated or otherwise made available to pay for these obligations.

### **TELPs and other mandatory payment commitments**

A Department may not terminate a lease or TELP contract for lack of funding without prior approval of the Comptroller to ensure that the termination is legally and fiscally appropriate and the termination will not negatively impact the Commonwealth's financial bond rating.

***A TELP may not be terminated unless the department is being eliminated and all funding is terminated.*** A TELP financing company has already paid an equipment contractor for the equipment being lease-purchased by the department, and similar to any mortgage, the department will remain liable for all payment to the contractor unless there is a default for bankruptcy (department is eliminated).

Normally, the commonwealth is required to transfer the payment obligation to another department or to seek appropriation of sufficient funds to close out this obligation. Similar to any default on a loan or mortgage, a default on a TELP has serious implications to the financial credit rating of the Commonwealth and must be avoided at all costs, including requiring a department that is not being terminated to terminate other contracts and personnel to free up sufficient funds to make all TELP payments.

### **Reduction in Funding or Allotments**

For most contracts, if the available funding is eliminated for a contract, for any reason, the contractor must be notified immediately in writing and the contract (or the underlying document under a statewide, OSD-designated statewide or multiple departmental contract) shall be deemed suspended and the contractor shall not be entitled to compensation for any performance provided after the date of suspension. A department does not have the authority to negotiate this with a contractor nor may a department accept continued performance pending additional funding.

When a department is faced with a reduction in available funding or a reversion of funds, the department's mandate is the primary priority, however, the department must honor the long term commitment if at all possible, or suffer the consequences of potentially severe termination penalties. If the available funding is not enough to cover all of the remaining contracts, the department has three options:

Suspend a contract or portion of performance until available funding is received;  
Amend a contract to reduce the amount of allowable performance; or  
Terminate a contract with sufficient notice.

If a lack of available funding occurs, the department has no authority to request or authorize continued contract performance or to compensate the contractor for any performance provided during the period of the lapse in available funding. If available funding is pending, the department must suspend contract performance until the available funding is in place, at which time contract performance may continue. If available funding is not pending or imminent, and the department has no other legally available funding from any other sources, the department must either continue the suspension or terminate the contract. In the event the department receives available funding during the period of the original procurement, the department and the contractor may lift the suspension or execute a new contract for the remaining duration of the procurement.

If funding is not available for encumbrance and expenditures, if accounts are not reauthorized past the termination date (such as on June 30<sup>th</sup> for operating accounts, or at the end of a capital bond authorization) a department may not authorize performance to begin or continue. The department may not continue to incur obligations or continue to accept services from employees or contractors in these accounts (even if the employees or contractors want to volunteer to continue work). Contracts must be terminated or suspended, personnel must be terminated, or contracts and personnel transferred to other appropriate accounts legislatively authorized to fund these types of obligations and expenditures.

Departments **MUST** immediately notify contractors and must work with appropriate budget staff whenever available funding for a contract may be in jeopardy.

*\* For POS Only:* For contracts subject to the Commonwealth Terms and Conditions for Human and Social Services, when the following specific bases for immediate termination exist:

the absence of appropriation, allotment, or availability to the department to discharge its obligations under the contract in the fiscal year;  
a change in general or special law or regulation which prohibits or limits the department's authorization to spend available funds for the purpose of the contract;  
a party's default, breach or any intervening casualty which poses an immediate threat to the life, health or safety of a client;

the indictment of the contractor or one of its principals or officers for an offense or offenses related to the provisions of services;  
fraudulent activities on the part of the contractor in its dealings with the Commonwealth; or the filing for bankruptcy by the contractor.

### **Suspension/Termination for Cause**

If the contractor breaches any material term or condition of a contract, or fails to fulfill any material obligation required by a contract, a procuring department may terminate or suspend a contract for cause by providing the contractor with prior written notice.

Departments should only use suspension or termination for breach when the department has clear **documented proof** of the breach or default. No action should be taken without consulting the department CFO and legal counsel. If litigation might result, the Office of the Attorney General should also be consulted prior to any notice to the contractor.

Some contracts may be utilized by more than one customer, and all known customers should be notified of the intent to cease doing business with a contractor. Departments must be prepared to produce the level of documentation necessary to stand up in a court challenge, including documentation that the performance terms were clear and unambiguous and the breach was obvious. Additional documentation may include affidavits from department personnel and documents that verify and support the allegations of breach or default supporting the suspension or termination. Suspension may be used to halt performance or to halt payments (reject or hold invoices with notice to the contractor) until the contractor corrects the breach or default.

The applicable contract language will determine the parameters within which a department may terminate or suspend contract performance or payments for breach. As a result, a department should make every effort to clearly describe its expectations in its procurement and other contract documents. If the contract terms and conditions of performance are clear, complete and detailed, it will be equally clear when a breach or default has occurred. Performance measurements are also helpful in determining breach or default. If a department has clearly specified how performance will be judged and what the expected standard of performance will be, the contractor should be held to that standard. Oral agreements, amendments or conversations do not carry the weight of the written agreement and therefore should be formalized through the use of written amendments if performance is to be judged against these standards.

*\* For POS Only:* A contract subject to the Commonwealth Terms and Conditions for Human and Social Services may also be terminated for cause, with a minimum of 45 calendar days notice, due to reduction of funds appropriated for contracts or when a statute or regulation which governs performance is changed, differently interpreted or adopted, thus significantly increasing the burden on either party in complying with the terms of the contract.

### **Termination without Cause**

Departments may terminate a contract "without cause" whenever deemed appropriate by the department, upon prior notice to the contractor. Termination without cause is also referred to as termination for convenience. Termination without cause enables a department to terminate a contract without penalty, without giving a reason. This method enables the department to terminate a contractor without having to prove a breach, a lack of available funding, an emergency, change of circumstances or any other reason.

Termination without cause is appropriate for contracts such as fee for service or product contracts, rate contracts, or other contracts in which performance is upon request and the units are severable. Cancellation of a contract may reduce the contractor's potential profits, but in most circumstances, a contractor has not committed resources to completion of performance since items have not been requested.

Departments are cautioned to consider the basis for termination without cause. A department must be careful to avoid actions that could be found to constitute bad faith. Every contract has an implied covenant of good faith. Encouraging a contractor to incur costs in order to meet contract performance and then terminating without cause might give rise to a claim of bad faith. Contracting for a specified number of units of a specialty product over the course of a fiscal year, which requires the Contractor to purchase materials and incur other obligations in order to meet the contract obligations, might trigger a claim of bad faith if a department terminates without cause, unless the department negotiates mutually acceptable terms for the termination.

The termination without cause option may also be deemed in bad faith and inappropriate in circumstances in which a contractor is required to provide an end product, system, software, or report and can not receive compensation until performance is delivered and accepted, and the department terminates without cause prior to the delivery and acceptance of the product. If the contractor was performing in accordance with the contract performance requirements and there were no emergency or other funding implications to support a termination, the department may be deemed to have unfairly terminated the contract. In this circumstance, the department should compensate the contractor for a reasonable amount of costs incurred in good faith to perform the contract.

When providing notice of termination without cause the department should identify the period of notice (if not specified as part of the contract) and what allowable performance is anticipated and authorized during the notice period. The department should negotiate final costs associated with the termination. Termination without cause will not relieve a department from compensating the contractor for performance provided and accepted by the department and costs incurred in accordance with the terms of the contract up to the effective date of the termination, or as otherwise negotiated by the parties.

For most "off the shelf" product or "upon request" fee-for-service contracts, which have no guaranteed amounts of performance or units, 30 days prior notice of termination is standard. For other contracts involving projects or product development, or which require the Contractor to commit to provide services (such as maintenance contracts, leases and TELPs) notice periods should be negotiated to reflect the needs of the parties. Some parties may agree to have notice periods that equal "the remaining time of the contract" in effect negating this option as available and requiring termination only for cause or a loss of funding. Many leases and all TELPs limit without cause terminations, or subject terminations to substantial penalties.

*\* For POS Only:* Either party may terminate without cause with 60 days notice.

### **When is a Contract Amendment Needed?**

Contracts may need to be modified during the contract term. An amendment is a change to the terms of a contract that is negotiated and executed by both parties. The unilateral modification of significant terms of the contract by either party can result in breach or default of the contract, therefore it is important for both the department and the contractor to review their contracts on a regular basis to ensure the terms remain current.

If circumstances produce the need to amend the terms of the contract to prevent default or breach, such as passage of a new law that affects either party's ability to perform as anticipated, and the parties cannot agree to amended terms, then the contract should be terminated. An amendment must be executed whenever there is a significant or material change to the terms of a contract.

Although day-to-day contract correspondence and communications may be made electronically (email or fax) any changes in performance, funding, obligations or changes in the terms of a contract (including grants, subsidies, ISAs, etc.) must be memorialized, contemporaneously with the need for the change, in a formal contract amendment. **Electronic signatures for contracts and amendments are not**

**authorized.** Therefore, departments may negotiate an amendment electronically, but must finalize the amendment in the same manner as the contract with written (wet) signatures by authorized signatories of the department and contractor.

### **What can be amended?**

The scope of any amendment is limited by the language in the contract procurement and the contract itself. Further, the RFR or other procurement should clearly delineate the changes to the contract that would require formal amendments versus those which would be considered administrative in nature (not requiring a formal amendment).

Contracts governed by 801 CMR 21.00 may be negotiated at any time during the contract period based upon the terms of the RFR. The best value standard set forth in 801 CMR 21.07(1) allows the department and a selected bidder (or a contractor) to negotiate a change in any element of contract performance or cost identified in the RFR or the bidder's response which results in lower costs, a more cost-effective or better value contract than was presented in the bidder's original selected response. Changes can be negotiated which result in overall increased costs, provided the overall result is the best value or a "better value" than was originally proposed. In summary, as long as the subject of negotiation results in a better value within the scope of the RFR than what was proposed by the bidder in the original selected response, it is negotiable.

The same best value standard applies to grants and interdepartmental services.

### **State finance law applies to amendments.**

State finance rules apply equally to amendments. Any amendment that increases the financial obligation for the Commonwealth will be subject to appropriation of available funds and other funding rules. If an amendment changes the dates, amounts, or any information in the original MMARS document, a modifying document will also have to be done contemporaneously with the execution of the amendment and processed in MMARS. See policy "**State Finance Law and General Contract Requirements**".

Performance under an amendment is subject to the same funding rules as any obligation or expenditure. Departments must do everything legally allowed to manage within current appropriations. Departments must immediately notify CTR, ANF and the House and Senate Ways and Means Committees of the estimated amount of any anticipated deficiency in any appropriation. See [M.G.L. c. 29, § 9E](#).

If funding is not available for encumbrances and expenditures under an amendment, if accounts are not reauthorized past the termination date (such as on June 30<sup>th</sup> for operating accounts or at the end of a capital bond authorization), a department may not authorize performance to begin or continue under an amendment. ***The department may not continue to incur obligations or continue to accept services from employees or contractors in these accounts (even if the employees or contractors want to volunteer to continue to work).*** Contracts must be terminated or suspended, personnel must be terminated, or contracts and personnel transferred to other appropriate accounts legislatively authorized to fund these types of obligations and expenditures.

Expenditures for obligations under an amendment may not be made against other accounts to "front" funds during this time period and such expenditures may not be retroactively transferred (Expenditure Correction - EX) to these accounts should the accounts be re-authorized, or a new account(s) established. The Comptroller may not make journal entry (expenditure correction) between accounts if the account ultimately to be charged had insufficient funds at the time the amount was expended from the other account, unless prior written notice is sent to HOU and SEN Ways and Means. See [M.G.L. c. 7A, § 3](#). This means that expenditures made to another current account because a supplemental budget has not yet passed, or ISA funding has not been set up, cannot later be charged to the new accounts or reauthorized accounts when the supplemental budget passes because there were insufficient funds in the account from

which the charges were to be made, without prior written notice to the House and Senate Committees on Ways and Means.

If performance is partially but not fully completed by the close of the fiscal year (by June 30<sup>th</sup>) and the performance is severable and capable of being paid for in subsets, all performance capable of being accepted should be compensated using current fiscal year funds. For appropriated funds in non-continuing accounts, the resolution of final contract payments must be completed no later than August 15<sup>th</sup> for performance delivered by June 30<sup>th</sup> in any fiscal year in order to enable retainage payments to be released by the end of the accounts payable period on August 31<sup>st</sup>.

If resolution of final contract payments cannot be completed by the end of the accounts payable period, the department may take the appropriate steps to include the final payments on APEN to extend the period for payment until September 15<sup>th</sup>. Payments must be made within the accounts payable period or the amounts appropriated for final payment and retainage will lapse (revert) unless the department obtains a PAC – prior appropriation continued. If a PAC is not obtained, the amounts for final payments or retainage will have to be paid as prior year deficiencies (PYD) which will be charged back to the next fiscal year's funds.

Any remaining performance made in a subsequent fiscal year must be paid using that subsequent fiscal year's funds, including retainage payouts connected to this performance. A department may pursue legislation as part of the GAA or a supplemental budget that enables a PAC (prior appropriation continued) which is the ability to use prior year funds for the services completed in the subsequent fiscal year.

#### **Amendment to Contract Dollars and/or Duration**

The scope and language of the original contract, RFR or other procurement will determine whether a department and a contractor will be able to negotiate amendments to contract dollars or duration. A contract must specify a definite period or duration of the contract that cannot be open-ended or ambiguous. If the RFR or other procurement states, for example, *"two years initial duration plus two additional options to renew not to exceed one year each,"* the resulting contract will be limited to a maximum of four years.

Normally contracts are limited to the maximum obligation and duration specified in the contract and procurement. For example:

If the RFR (or other procurement) and a contractor's response proposed a maximum project all-inclusive cost for a completed project and there have been no material changes made by the procuring department, a dollar increase for the identified project is NOT allowable. Contractors must perform based upon what they promised. If it costs the contractor more than planned, this is the risk that was assumed by the contractor. Extensions of time to complete performance are allowable, but there may be no additional costs in such circumstances.

Increases above the maximum obligation or maximum duration identified in the original RFR (including options to renew) may be allowable with certain restrictions. For example:

If the RFR (or other procurement) and a contractor's response proposed a maximum project all-inclusive cost for a completed project and if the requested increase in cost is due to a change made by the department to the original project, through no fault of the contractor, and the change is within the scope of the original RFR (or other procurement) or the contractor's response, an increase in maximum obligation is authorized to address the required change and the contract may be extended beyond the maximum termination date stated in the RFR (the end of the initial duration and all options to renew) for the minimum period necessary to complete performance of the project.

If the maximum obligation or maximum number of units or services specified in the RFR (or other procurement) is clearly specified as being an “estimate” and bidders were clearly notified in the RFR (or other procurement) that these were negotiable during the contract period, the amendment is allowed at the procuring department’s option, but the contract duration may not be amended to extend beyond the maximum duration specified in the RFR.

If a maximum obligation was identified in the RFR (or other procurement) only to identify current needs and bidders were clearly informed in the RFR (or other procurement) that additional performance might be requested if additional funding became available, or if required by the department, and the required performance is within the scope of the original RFR (or other procurement) or the contractor’s response, the maximum obligation may be increased based upon the needs of the department, but the contract duration may not be amended to extend beyond the maximum duration specified in the RFR.

If a maximum obligation was identified in the RFR (or other procurement) only to identify current needs and bidders were asked to provide responses with all available commodities and services and cost structures based both upon current needs and additional purchases, or a “market basket” or “catalog” approach, the maximum obligation or a change to the listing of “market basket” and/or “catalog” may be increased or decreased based upon the needs of the department, but the contract duration may not be amended to extend beyond the maximum duration date specified in the RFR.

If the RFR and contracts **do not** specify a maximum obligation or **do not** specify a number of units, then specifying items or performance to be delivered and base compensation for the number of units requested by the department does not require a formal amendment but such requests must be made by written notification to the contractor (fax, mail or electronic mail) and confirmation of actual receipt of notice.

801 CMR 21.00 Contracts - Contract Expansion. The Required RFR Specifications, incorporated by reference into all *Standard Contract Forms* for 801 CMR 21.00 contracts, even if the terms were not included in the RFR, contains the following contract expansion language:

*If additional funds become available during the contract duration period, the department reserves the right to increase the maximum obligation to some or all contracts executed as a result of this RFR or to execute contracts with contractors not funded in the initial selection process, subject to available funding, satisfactory contract performance and service or commodity need.*

This language allows negotiations to enable the efficient use of additional funds without the necessity to amend the RFR or conduct a new procurement.

### **Amendments to Contract Performance**

From time to time, departments may want or need to modify the terms of performance. Departments may negotiate changes to the original performance measures, reporting requirements or payment methodologies tied to performance at any time during the contract duration as long as the changes are consistent with the specifications of the original RFR. The need to amend the performance terms may result from changes in available appropriation, in the type of customers, consumers or clients needing services or other factors that are beyond the control of the department or the contractor. If there is no change to the contract fiscal terms, no MMARS encumbrance modification document is required; only the Standard Contract Amendment Form must be executed and filed in addition to any required or optional attachments.

### **Amendment to Contract Duration Only**

While 801 CMR 21.00, 815 CMR 2.00, 815 CMR 6.00 and most procurement rules do not prescribe any set limits for procurement duration, the dates of the total anticipated duration (including options to renew) specified in the RFR, grant application determine the allowable duration for a contract.

An increase or extension to the duration of a contract beyond the maximum period identified in an RFR is allowable only to enable a contractor to complete performance, as originally agreed. No additional dollars are allowable under this option. This option is only available to finish a contract not to extend it out over a longer period of time. There is no limitation on the extension of the duration and a contractor may continue until performance is completed, provided the department agrees to the extension of duration. If payments are contingent upon the completion of performance, the department must take whatever action is necessary to ensure that sufficient funds are still available for payment when performance is completed (such as request a legislative prior appropriation continued "PAC" to carry over funds into the next fiscal year).

The only exception to these limits arise if the department has negotiated an Interim Contract or Interim Grant under 815 CMR 2.00, 801 CMR 21.00 or under a Level II or I department's procurement policies and procedures, or has implemented a thirty-day extension. (See [Thirty-day extension](#).)

### **Changes to Informational Items or Accounting Information**

Informational changes that are not material contract terms, such as state accounting codes, funding accounts or other references may require a change in MMARS if necessary, but do not require a formal contract amendment. Changes are filed as part of the procurement/contract file. For example, the accounts from which a contract is funded are not a material term of a contract and may be changed by the department during the term of the contract without notice to the Contractor or a formal contract amendment. As long as the contract is fully funded and matches the material terms of the contract, a department may redistribute funds, change accounts, object codes or other accounting information without a contract amendment form.

### **Exercising Options to Renew**

Exercising an option to renew may be made if an option to renew:  
was specifically identified in the original RFR; grant application or other procurement;  
does not extend the duration beyond the maximum period identified in the RFR (or other procurement) or posting for a contract employee;  
is executed under the same terms and conditions as stated in the original procurement and contract. However, a department and contractor may negotiate any of the details of performance which were identified in the contract, the RFR, grant application, other procurement or the contractor's original response;  
is for a pre-determined time period specified in the original RFR (or other procurement); and  
is executed through a formal amendment by the contractor and the department prior to termination date of contract.

If the contractor has not offered prompt payment discounts or is not enrolled in Electronics Funds Transfer EFT (either because it was not required in the procurement or it was deemed inappropriate at the time) contract renewal provides an excellent opportunity for departments to encourage contractors to offer prompt payments and to take advantage of this cost saving payment method offered by EFT. EFT is the Commonwealth standard for all contract payments. Please see Policies: [Accounts Payable – Electronic Funds Transfer \(EFT\) and the Commonwealth Bill Paying Policy](#).

Departments should extend an offer to renew the contract at least thirty days (and preferably earlier) prior to the scheduled end date of the contract using the Standard Contract Amendment Form or other prescribed form.



Failure to execute the option to renew by the scheduled end date of the contract will result in termination of the contract. Once terminated, a contract may not be "revived" retroactively and the department and contractor will be required to execute a new *Standard Contract Form* and all applicable attachments. Performance must be suspended and the contractor is not entitled to any compensation under the contract for performance requested and accepted by the department during any lapse between contracts. See [Performance outside scope of contract document – Settlements and Prior Year Deficiencies](#). Any time remaining under the procurement will still be available for use by the department, less the time between any lapses in the contract document. Please see section below on "[Process for Documenting Amendments](#)." See [Thirty-day extension](#).

Although options to renew are made at the discretion of a Department, the exercise of an option(s) to renew is considered a Contract amendment which will not be effective until documented by the execution of a *Standard Contract Amendment Form* by the Department and Contractor prior to the termination date of the Contract. A Department may exercise more than one option to renew at a time, if multiple options are still available under the procurement. For example, a procurement with three, one-year options to renew may exercise all three options at once and execute a multi-year contract for the three year period.

If a Contract terminates prior to using the time left under a procurement, any remaining time available may still be used by the Department with the following restrictions: (1) the lapse in time between the original Contract termination date and the execution of a new Contract will be lost and must be deducted from the total available time left under the Contract procurement, and (2) Departments should ensure that any newly signed Contract, plus any additional negotiated terms, be included in the procurement file with the original record copy of the Contract.

#### **Contractor Legal Name or Legal Address Change Only**

If a contractor changes its legal name or address (or both) but does not materially change its organizational structure, financial condition, procurement or contract obligations, the department may continue the underlying contract(s) without amendment, and interim contract, or a new procurement.

For example, a contractor wants a new image and decides to change its name, a contract partnership adds a new partner, or an individual gets married or divorced and changes his/her legal name. In addition, a contractor may change its business location or where its tax reporting information should be sent.

Procedurally, the contractor must notify any department with which it has contracts of its legal name change, with documentation supporting the change. One department will be responsible for updating the Vendor/Customer file with the new information. The contractor is required to sign a new Commonwealth of Massachusetts *W-9 Form* and applicable "*Commonwealth Terms and Conditions*" to reflect the legal name or legal address change (or both). The department must also update the Vendor/Customer Table with a Vendor/Customer Modification (VCM) in MMARS and submit the new ***W-9*** and *Commonwealth Terms and Conditions* to the Office of the Comptroller, Accounts Payable Bureau. Underlying contract documents and payments are not affected, however, it is good business practice to identify the new legal name on all contract and payment documents.

**Note:** Departments must also update the Comm-PASS Contract record to reflect the most current information and any MMARS records to ensure that the encumbrances and payments reflect the correct Legal name of the contractor.

#### **Process for Documenting Amendments**

Contract amendments are made using the *Standard Contract Amendment Form* (or other appropriate amendment form for construction, leases, etc.), attaching the details of the amendment (date change, change in scope, costs, etc.). The amendment is sent to the Contractor for signature and must be

executed by both parties contemporaneously with the need for the Amendment but in no event later than the termination date in the Contract.

In the majority of cases, amendments are mutually agreed to by the parties. Amendments requesting increased performance (as authorized by the procurement or contract) are fairly routine and do not meet resistance by Contractors unless a Contractor is unable (or unwilling) to increase the requested additional performance.

Departments should pay special attention to ensure that amendments are timely negotiated to have contract coverage for all Commonwealth projects and programs. This is especially important when a department is faced with budget or allotments cuts. Departments may be faced with having to terminate, suspend or amend contracts to reduce maximum obligations or the scope of anticipated performance. Suspensions and terminations are completed by providing prior notice under the terms of the Contract and closing out current contract obligations.

However, when departments seek to implement contract reductions some Contractors may refuse to agree to a contract amendment reducing the contract performance or the maximum obligation of a contract. In these instances, a notice of termination or suspension, usually in the form of a letter distributed by the Contractor, is necessary. A department has the option to provide a notice of contract amendment outlining a contract reduction which also contains language for a notice of termination or suspension if the contractor refuses to negotiate or agree to the contract reduction.

The notice may contain language authorizing performance up to a specified time limit or not to exceed a set dollar limit above which the Department will no longer accept or pay for performance. Since contract increases and decreases must be mutually agreed, a one-way contract amendment reducing a contract may not be done. If a contractor refuses to negotiate a contract amendment the contract will terminate or be suspended by operation of law unless earlier terminated or suspended by the department. Departments anticipating any delays in obtaining an amendment prior to the termination date the Contract may use the thirty day extension as part of their notice of amendment. See [Thirty-day extension](#)

Departments are also required to reflect any amendment having a fiscal impact (increase, decrease, change in funding source, change in performance dates, rates etc.) in the state accounting system (MMARS) using the appropriate transaction modification form.

Some amendments will affect fiscal information with no underlying contract changes and will not have a contract amendment form. For example, Rate Contract increases and decreases in total obligations which can be done without any underlying contract change and appropriation account changes (switching, adding or deleting accounts) with no underlying contract change. For these changes, the department enters and processes the change in MMARS. If the change is outside the department's document processing delegation limit the department must submit the doc id of the MMARS document on a Comptroller Transmittal Form indicating the type of change required.

Note: Regardless of Comm-PASS Subscriber status, every active vendor listed on a Contract in Comm-PASS receives email notifications when a Contract is amended. An amendment on Comm-PASS does not constitute a legal change, but is merely a change to the record by the Contract manager. This means that department contract managers can use the Comm-PASS amend capabilities to communicate with all vendors. For example, an amendment "reason" might read, "Fill out and return Affirmative Market Program (AMP) Plan, if applicable." The form can be attached to the Forms and Terms page for easy access.

### **Guidelines On Material Changes In A Contractor's Identity**

A change in the contractor's Tax Identification Number (TIN) usually signals a material change in the contractor's identity such as a merger, acquisition, consolidation or other organizational restructuring.

When this occurs, the procuring department (or Procurement Management Team (PMT) for 801 CMR 21.00 contracts) must determine the impact on its contracts. OSD makes the determination for statewide contracts. The department must require, review and place in the procurement/contract file a clear and detailed statement of the material change sufficient to enable the department to decide, in its best interests, whether it will permit the assignment of the contract to the successor entity, award the remaining performance to the next best value bidder (or grantee), conduct a new procurement or take any other action permitted under the relevant procurement regulations, policies and procedures.

Decisions to continue contracts after a contractor has materially changed its identity are made by departments on a contract-by-contract basis. Since the analysis may be different for each contract, one department is not bound by another department's decision.

A material change in contractor identity occurs whenever the legal name, organizational structure, Tax Identification Number (TIN), Vendor Code or other change occurs in a contractor from what was presented in the contractor's response to a procurement. However, certain changes, such as a legal name change, are insignificant to the underlying contract(s) and should merely be recorded to keep the procurement file up-to-date. Other changes are considered material and may affect not only the underlying contract(s) but also the integrity of the original procurement.

This policy outlines some of the most common material changes to a contractor's identity and provides basic guidance to departments. Departments are strongly encouraged to seek the advice of their legal counsel whenever these circumstances arise. In addition, a *Change in Contractor Identify Form* is available for documenting information in such circumstances.

#### **Material Change In Contractor Identity: Merger, Buyout Or Consolidation**

A merger, buyout or consolidation is a **structural change** to a contractor in which the assets and liabilities of one or more organizations (one being the contractor) are combined into a single successor entity. Both mergers and consolidations are governed by state statutes, which require a formal filing with the Secretary of the Commonwealth and that certain conditions are met. One important provision to note, under M.G.L. c.156B, s.80 and c.180, s.10A, is that the new entity assumes all of the obligations and responsibilities of the prior entity. Other forms of a material change in the contractor (whether or not a new Taxpayer Identification Number results) are described at the end of this document.

**Merger or Buyout.** One or more organizations merge into another, or one organization buys another, and one becomes the surviving organization. For example, Organization A merges into, or is bought out by, Organization B and the surviving entity is Organization B, with A no longer existing as a separate legal entity.

In that case, if the department's current contractor is Organization B, the merger or buyout will not change the underlying contract documentation. The department should verify, however, that the merger or buyout by the contractor will not result in any changes to the performance responsibilities of the contractor under the current contract(s).

If, however, the department's current contractor is Organization A, which is merged into, or is bought out by, Organization B, this presents a **substantial structural change** in the contractor which does affect the underlying contract(s) and procurement, and may trigger the "assignment" or "termination" clauses of the applicable Commonwealth Terms and Conditions.

**Consolidation.** Two or more organizations combine ("consolidate") into a new or resulting corporation (A + B = C, with both A and B no longer existing as separate legal entities). If the department's current contractor is either Organization A or B which are consolidated into a new Organization C, this presents a **substantial structural change** in the contractor which does affect the underlying contract(s) and

procurement, and may trigger the “assignment” or “termination” clauses of the applicable Commonwealth Terms and Conditions.

### **Contract Options with a Material Change in Contractor Identity**

If the *Commonwealth Terms and Conditions* applies to the contract, this contract contains provisions on termination and contract assignment which assert the Commonwealth’s control over whom it does business with. While a contractor may freely make whatever organizational or structural changes it wishes, if it involves a material change to its identity (as noted by a change in Taxpayer Identification Number) then its existing contracts may terminate. Further, a contractor may not unilaterally assign, or delegate its responsibilities or duties under a contract to another entity. The procuring department has the sole authority to determine what to do with the remaining contract performance in all such instances.

When faced with a material change in contractor identity, a department must determine what is in the best interests of the department, what actions are appropriate to prevent a lapse in any necessary services or a project, the most cost-effective actions given available resources and funding, and what actions will maintain the integrity of the original procurement.

Executive departments should invoke the procurement principles stated in 801 CMR 21.01(1) to evaluate the proposed or actual business change of the contractor for goods and services contracts. The procuring department or PMT should develop, review and place in the procurement file a clear and detailed statement of the material change sufficient to enable the department to decide, in its best interests, whether it will continue the underlying contract(s) or undertake any other action.

Departments have the following options when faced with a material change in contractor identity:

1. Continue the contract through assignment to the successor entity, upon review and justification as outlined further in this document;
2. Award a short-term interim contract to the intended successor entity on a competitive procurement exception basis (in order to permit adequate time for a review and/or re-procurement and potential transition to a new contractor);
3. Award the remaining contract performance as an interim contract to another contractor (the next best value bidder from the original procurement, or another eligible grantee) on a procurement exception basis, if justified;
4. Consolidate the contract into another existing contract (if scope is arguably within the scope of the original procurement);
5. Allow the contract to lapse or terminate the contract;
6. Suspend or terminate the current contract and re-procure the contract; or
7. Take any other permitted contracting or procurement action that supports common-sense procurement decision making and fiscal responsibility based upon the circumstances.

### **Contract Assignment**

A contract assignment refers to an assignment of the remaining contract performance to a successor contractor or to another department. A department should approve the assignment of the remaining contract obligations, duties or responsibilities under a procurement to another entity only in certain circumstances. These are usually limited to circumstances in which a contractor’s identity changes (through a merger, buyout, consolidation or other underlying business relationship) resulting in the formation of a new successor entity and the department has determined that the assignment of the remaining performance is essential. In addition, departments may freely assign a contract to another Commonwealth department.

When a contractor is planning a merger or other significant organizational transformation, it is important that the relevant state departments be informed as early as possible; at least 60 days advance notice of the potential change is desirable. If the contractor holds contracts with multiple procuring departments, each procuring department will then undertake a review and may grant approval of a contract assignment,

including the establishment of conditions, if appropriate, or may take any other contract management action it deems advisable under the specific circumstances. A decision that one procuring department makes does not apply to any other procuring department who may hold contracts with the same contractor.

### **Evaluating the Impact of a Material Change in Contractor Identity**

The primary responsibility of department staff is to protect the interests of the Commonwealth and of the interests of consumers being served under any contract. As with most procurement decisions, department staff are free to use their judgment in determining the scope of review, the relative importance of various factors and how to gather necessary or desirable information, prior to making any contracting decisions. The department is responsible for maintaining documentation of its review process and all other relevant information in the procurement file.

In considering whether or not to permit a contract assignment when there is a material change in contractor identity, a department should conduct and document a thorough review of the potential impact. Factors to consider include:

#### **Critical Services or Continuity of Program or Project**

This is probably the paramount consideration when faced with a material change in contractor identity. In certain circumstances, such as a critical need to prevent a lapse in services for certain types of long-term service projects, mandated client services, clients in residence, etc., it may be prudent to permit these contracts to be assigned to a successor organization, rather than terminating and re-awarding these contracts to another contractor.

For most commodity contracts, and many service contracts, where clients or a program are not involved, a requested contract assignment to a successor entity should be carefully scrutinized. Since the successor entity may not be one of the original bidders (or grant applicants), this entity has no automatic right to the remaining contract performance, absent extreme or special circumstances that warrant a contract assignment. Instead, departments should consider whether the assignment is appropriate or an interim contract with other bidders under the original procurement, or current eligible grantees.

#### **Original Procurement Requirements**

The successor entity must meet the same requirements as the contractor under the original procurement. Some of these requirements include basic qualifications under an RFR, years of experience, M/WBE status or subcontracts, consumer-controlled or non-profit organization status (which might affect its competitive ranking or eligibility for a contract award) and internal contract management capacity.

Absent special circumstances, a resulting successor entity that does not meet or exceed the same material requirements as the contractor under the original procurement should not be awarded a contract performance assignment.

#### **Qualifications of Successor Entity**

The assignment of the remaining contract performance under a procurement should not be made to a successor entity unless the level of quality of performance will be maintained or increased. Departments should consider the new entity's service delivery philosophy, financial stability, capacity to service the contract, new and existing staff resources and qualifications, program plan and other factors to ensure the successor entity offers the equivalent or a better value than the current contractor.

An assignment is only appropriate if the new contractor's key personnel, financial stability, staff resources and qualifications are equal to or better than the current contractor. If the financial

stability, capability to perform and the core individuals responsible for performance are the same, it is easier to argue that an assignment is appropriate. If not, the department must be able to defend that the assignment is more appropriate than the award of an interim contract to the next ranked best value bidder or a new procurement.

This consideration is especially important if the contractor was selected specifically for its expertise which is not easily replaced. See also [M.G.L. c. 106, § 2-210](#)

### **Price or Cost Implications**

In order to maintain the integrity of the original procurement, assignment of the remaining contract performance under a procurement or grant award process should not be made unless the cost or price implications of the assignment do not materially increase or change. The successor entity should be assuming the contractual responsibilities outlined in the current contractor's RFR response at the same costs and prices as negotiated under the original contract.

However, the department and the successor entity (new contractor) may negotiate any costs or prices as authorized under the original RFR, grant application, other solicitation and the resulting contract. Other factors to consider are economies of scale factors, blending rates, special costs, etc.

### **Non-Profit Status**

Additional considerations arise when the original contractor was a non-profit. If an organization's non-profit status is affected by a material change in contractor identity, there are legal, policy and administrative factors that departments should consider. Many federal funding sources used are limited to non-profit or governmental recipients; thus, departments should review any funding source restrictions (e.g., in the Catalog of Federal Domestic Assistance) in such circumstances. Often times there are public and community implications that departments should be aware of as well.

### **Assumption of Liabilities**

Will the successor entity assume all the obligations and liabilities of the prior contractor under prior year contracts within the current contract cycle of the contract to be assigned? While this is required in mergers and consolidations (see M.G.L. c. 156B, § 80 and M.G.L. c 180, § 10A for relevant legal requirements in Massachusetts), in other situations, such as a contractual affiliation, the department should assure itself that all outstanding or potential obligations and liabilities will be covered. Pursuant to [M.G.L. c. 106, § 2-210](#), "No delegation of performance relieves the party delegating of any duty to perform or any liability for breach."

*\* For POS Only:* For human and social service contracts, the successor entity should be aware of Commonwealth audit and audit resolution policies and understand that it may be liable in future years for findings of audits to be conducted of prior year activities.

### **Reasonable Risk of Insecurity**

Pursuant to [M.G.L. c. 106, § 2-210](#) the department may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (successor entity). See also [M.G.L. c. 106, § 2-609](#).

### **Administrative Process for a Material Change in Contractor Identity**

In cases involving a material change in contractor identity that may affect more than one department (such as a Statewide Contract), the affected departments may identify a principal procuring department or another agreed upon state agency to assume responsibility for coordinating and facilitating communication among other affected departments. This communication is key to ensure that there is no disruption of payments to the current or new entity if an assignment occurs.

It is important to note, however, that the decision on whether or not to assign or terminate a contract may vary within and among departments, depending on the program specific elements of the contract review as well as other administrative factors. A department should explain to the current contractor and successor entity that any changes will apply solely to the department (unless a statewide contract or other multi-department Master Agreement (MA) is being modified) and that the same process will need to be repeated with each state department with which the contractor does business.

Departments must also identify and plan the appropriate administrative steps necessary if the review indicates a contract assignment is desirable. Probably the most critical issue facing departments affected by material changes in contractor identity is the need to prevent any disruption of client services or service projects or programs that are in progress.

To insure the timely authorization to assign performance, departments must coordinate the end date of performance and funding for the current contractor with the start date and remaining performance and funding for the successor or new contractor. Departments will need to allow sufficient time to gather and process information in order to determine the legal form of contractor change in identity and the corresponding administrative requirements, including tax status and board governance requirements.

Detailed discussions should be held with the current contractor as soon as possible to determine accurate and complete obligation levels for the contract(s) up to the date when contract performance will be assumed by the successor entity. These discussions must identify all services or service units which have been delivered and any outstanding or supplemental units expected to occur within the time frame determined. It is especially important to identify and review all payment invoices not yet submitted, or submitted and not yet paid and to identify and resolve any service delivery or reimbursement problems.

As a special note, for all cost reimbursement contracts, the current contractor needs to assure that all incurred costs up to the planned transfer date have been identified and included in the final obligation amount. Once contract dates and funding levels for the current and successor contractors have been agreed upon, the department should prepare a *Change in Contractor Identity Form*, which serves to document the details associated with the change in contractor for the underlying contract including all outstanding payments due the current contractor and the remaining performance authorized for transfer to the new contractor.

Oversight departments do not usually play an active role in the review process, however, CTR, OSD and the relevant secretariats are available for consultation as needed. CTR and OSD can provide guidance on how a planned contractor change in identity might affect the underlying original procurement or contracts. In addition, OSD and CTR can issue regulatory interpretations for the contracts within each department's respective jurisdiction. The secretariat may make policy determinations for cross-agency program/funding implications and determine principal procuring department or lead coordinator, if necessary.

*\* For POS Only:* Examples of OSD regulatory interpretations include the UFR filing determination and whether related parties result from the change, etc.

### **Required Documentation for Material Change in Contractor Identity**

A material change in contractor identity, such as with most mergers, buyouts and consolidations resulting in a new successor entity, also involve a legal structural change and a new **Tax Identification Number**. Therefore, along with identifying contract specific information to assign contract performance to the successor entity, several documents are required. There may be instances where the successor contractor is technically not "new" but rather is an existing contractor with a contract for the same type of service, into which the department may decide to incorporate the performance assignment.

The successor contractor must complete and execute, as appropriate:

A [MA-W9](#) Request for Taxpayer Identification Number and Certification (Massachusetts Substitute MA-W9 Form); if not listed as vendor in the MMARS Vendor Customer file.

the [Commonwealth Terms and Conditions Form](#) or [Commonwealth Terms and Conditions for Human and Social Services](#) for the successor entity (new contractor), or other appropriate contract document;

a *Change in Contractor Identify Form* to document any remaining performance and payments to the current contractor and the balance of performance and anticipated amounts to be expended by the new contractor. The *Contractor Change in Identity Form* documents the new contractor's commitment to assume all outstanding obligations and responsibilities under the current contract. This process replaces the need to do an Amendment with the current contract to close-out the current contract, and a new *Standard Contract Form* with the successor entity. All assignment information for the current and successor entities are retained in the same place;

any **required attachments** that were required under the original RFR (such as *Contractor Authorized Signatory Listing*, *Affirmative Action Commitment Statement*, *Affirmative Market Program (AMP) Plan*, *Mandatory Consultant Contractor Submission Form*, *Northern Ireland Notice and Certification* and any other attachments required by the department) and,

\* *For POS Only*: Written Disclosure of Current and Anticipated Related Parties pursuant to 808 CMR 1.04.

The department must also update the Vendor/Customer Table with a Vendor/Customer Modification (VCM) in MMARS and submit the new *W-9* and the relevant *Commonwealth Terms and Conditions* (if applicable) to the Office of the Comptroller, Accounts Payable Bureau. Underlying contract documents and payments are not affected, however, it is good business practice to identify the new legal name on all contract and payment documents.

The remaining contract documentation and MMARS transactions would be processed in accordance with standard contract processing and filing procedures.

### **Other Types of Contractor Changes**

For information purposes only, this summary describes common contractor business arrangements, from the least to the most integrated form of organizational combination/restructuring (except for merger and consolidation, which was described earlier). It is also important to note that these terms are sometimes used to mean something different than the legal concepts underlying the terms as presented here. Therefore departments should work closely with their legal departments when these situations present themselves.

These examples do not necessarily formally trigger the "assignment" clause, but may have an impact upon services which could justify a departmental review of the contract(s) anyway and follow-up monitoring or other action as needed. If serious concerns arise, the contract may be terminated with an appropriate notice period in accordance with the applicable *Commonwealth Terms and Conditions*.

**Management Agreement** - One party provides management services to another, as spelled out in a contractual agreement. The nature and scope of these agreements can vary greatly. This may or may not involve a delegation of some contract related responsibility which would be impacted by the assignment clause.

\* *For POS Only*: Also, reimbursement restrictions (see 808 CMR 1.00) and potential related party disclosure may apply.

**Joint Venture** - A limited purpose undertaking by two or more parties. The venture may be set up through a contractual agreement (functioning as a partnership), or more formally by establishing a separate corporation, either for-profit or not-for-profit, to undertake the activity or to provide support. In a contractual joint venture, one contractor must act as the lead agency in terms of being a party to a Commonwealth contract (because the Commonwealth generally does not enter into multi-party contracts)



and then subcontract with its venture partners. If a separate corporation is established and is intended to be the contractor, then it is treated like any other new contractor.

**Contractual Affiliation** - Similar to a joint venture, but the undertaking is broader in scope in terms of services involved. The participating parties may jointly develop programs, combine resources or lend assistance. One example of a contractual affiliation is the formation of a network, through the establishment of a new organization in which each affiliating contractor is a member. In this case the new "network" corporation enters into service contracts on behalf of the network, and subcontracts with its member contractors.

*\* For POS Only:* Related party disclosure requirements will likely be triggered. From an accounting perspective the affiliated parties may be determined to be consolidated entities, which must then file audited financial statements accordingly. Should the department wish to permit a contract assignment to the network corporation, OSD recommends that the department condition its approval, and resulting contract, on all entities assuming responsibility for prior year obligations. In this way, should prior year audit or other issues arise, there will be access to resources to satisfy prior year obligations whether or not the prior entity continues to directly hold Commonwealth contracts.

**Corporate Affiliation or Acquisition** - An action whereby one entity takes control of another (i.e., a parent/subsidiary relationship is established). In a not-for-profit this occurs through by-law changes so that the controlling organization appoints the directors of the subsidiary organization, which remains intact as a separate corporation.

*\* For POS Only:* In the above affiliation or acquisition, certain administrative requirements are triggered such as notification of changes to the Board of the acquired organization and related party disclosures. The department may wish to review the circumstances to determine whether the best interests of the Commonwealth and the consumers will still be served by the new arrangement.

**Asset Purchase/Acquisition** - A purchase of assets is a contractual arrangement where one organization purchases some or all of the assets, and possibly some or all of the liabilities, of another. The seller organization either ceases to exist or "dissolves" (a not-for-profit must petition the court for dissolution) or it is transformed into another kind of entity. In the latter case, the seller is no longer a service contractor - since it has nothing left to provide services with. In Massachusetts, if the seller is a public charity it must provide 30 days prior written notice to the Attorney General's Public Charities Division before disposing of all or substantially all of its assets, if a material change in the nature of the activities conducted by the charity will result.

The 801 CMR 21.00 contracts performed by the contractor (seller) are not "assets" that can be purchased by another organization. The department must determine how and by whom the services should now be delivered. Should a department determine that it is in the Commonwealth's best interests to assign a contract in these circumstances, it should condition approval on the new entity assuming prior year obligations.

#### **Terminated Contracts May Not Be Amended.**

A Contract which is not amended prior to its termination date terminates by operation of law and can not be amended. A Contractor is not authorized to continue performance after the termination date of a Contract even if the Department has notified the Contractor that it has exercised an option to renew or plans to amend the Contract. If a contract terminates and the parties agree to continue performance, the Contractor and Department will be required to execute a new contract with all the required attachments. **Performance made during any lapse in time between the original Contract termination date and the execution of a new Standard Contract Form can not be compensated under either the original or any subsequent Contract.**

To avoid any lapse in performance a department must make every effort to ensure that notice of options to renew or other amendments are timely made to a contractor with sufficient lead time to enable the contractor to review the amendment, negotiate any details or terms, execute the amendment and return to the department for signature prior to the termination date of the contract.

### **Thirty day Extension**

If a Department has any concern that a contractor will be unable to complete the amendment process timely the Department may include language allowing for a temporary extension to allow completion of the amendment. The following is sample language that could be included in the letter notifying the Contractor of an amendment. In order to include this type of language the letter must be signed by an authorized signatory of the Department.

*Your contract with the department expires on \_\_\_\_\_. If the contract is not properly amended prior to this date the contract will terminate and the parties will be required to execute a new contract with all relevant attachments which will result in delays. Performance is not authorized to continue under this contract during any lapse between the termination date of this contract and execution of a new contract and any performance will not be compensable under the current or the new contract. Therefore, in order to ensure continued performance and to prevent the necessity of additional paperwork, please review, have the amendment executed by an authorized signatory and return the amendment no later than \_\_\_\_\_ to allow the department sufficient time for signature prior to the contract termination date. Any negotiations and completion of details of performance must be completed prior to this date.*

*If for any reason you foresee any delay in submitting the executed amendment by this date please contact us immediately. To avoid a lapse in performance due to an inadvertent delay in completion of this amendment this notice shall serve as the department's authorization (as evidenced by the signature of an authorized signatory of the department below) that the contract shall be extended for a period not to exceed thirty days past the termination date under the same terms and conditions [or according to the attached terms ] for an amount not to exceed \$\_\_\_\_\_ during which time the amendment must be completed. This extension shall be void if the department receives a written objection or notice of suspension or termination from the contractor prior to the date of termination or if sufficient funds are not appropriated or otherwise may available to fund this performance.*

This option is not designed to be used as a routine method of delaying the amendment process but is meant to be a safety net if inadvertent and good faith delays occur. Departments may routinely include this language in notices of amendments, but will be required to justify circumstances in which the language is triggered and this temporary extension is required. This option may not be used to authorize the start of a new contract. The number of times a department requires this temporary extension will be subject to quality assurance review and audit.

### **Performance outside scope of contract document – Settlements and Prior Year Deficiencies**

A Department (or any other Commonwealth representative) is not authorized to request that performance begin or continue, that a purchase order be issued to a vendor or that any obligation be incurred by a contractor, for which compensation is to be sought under a contract, prior to the legal contract effective start date of that contract, or after the termination date of that contract.

Contractors are not authorized to deliver performance for which compensation is sought under a contract (even if requested by the Department or any other Commonwealth representative) prior to the contract

effective start date of that contract or after the termination date of that contract. Despite an incorrect date identified in the *Standard Contract Form*, delays in executing the contract or any oral or written representations, commitments or assurances made by the Department or any other Commonwealth representative to the contrary, the Contractor can not be compensated under the Contract for any performance delivered prior to the effective start date or after the termination date of contract. A department may not back-date a contract in order to cover the delivery of performance prior to the contract effective date or to extend a contract once expired.

The Commonwealth has no legal obligation to compensate a Contractor for performance delivered outside the scope of a contract. However, a department may also not accept performance outside the scope of a contract and then refuse compensation, since this type of action could be considered bad faith. If the performance was accepted by the department, accrued to the benefit of the department, the Commonwealth or customers/clients, and the department deems that performance is compensable, the department and the contractor may negotiate the reasonable value for the delivered and accepted performance under a *Settlement and Release*. (See [Settlement and Release Form](#))

Since the delivery and acceptance of performance without a valid contract in place is the fault of both the Department and the Contractor, the Settlement and Release is used to document the details of the circumstances, the negotiated compensation and the release language which ensures that the Contractor can not come back at a later date seeking additional funds related to the same performance.

If the performance was short term or temporary and is not related to another contract, the Settlement and Release serves as the “contract” documentation for this performance.

If the performance was made prior to the timely execution of a contract (the parties began performance prior to the contract effective start date), during a lapse in time between the termination date of a contract and a renewal contract (the parties failed to timely sign a contract amendment) or after the termination date of a contract where a new contract is not anticipated, the *Settlement and Release* and any supporting documentation would be filed with the record copy of the related contract. The performance would be paid under the same MMARS encumbrance and object code as if the performance were included under the original contract document. It is the department’s choice whether to identify the *Settlement and Release* payment under a separate line on the encumbrance. The Settlement and Release acts as the contract documentation to support the full contract relationship where there were lapses in the original or new contract.

If performance was delivered prior to the July 1st of the fiscal year in which the contract was executed, this performance must be paid from fiscal year funds for the fiscal year ending on that June 30th. If there were no funds available at the end of the fiscal year to cover this payment, or payment is delayed beyond the close of the accounts payable period on August 31st the compensation would be treated as a Prior Year Deficiency (PYD). The payments would be made by the Office of the Comptroller Payee, Payments and Tax Reporting Bureau and charged back to the current fiscal year appropriation(s) of the department. (Please see Policy Chapter “**Accounts Payable – Prior Year Deficiencies**”).

If performance was delivered after June 30th of a fiscal year and a contract terminated on June 30th which was not renewed, any negotiated compensation, if any, would have to be paid from the new fiscal year’s appropriations or available funds, since delivery occurred in the current fiscal year.

The use of the *Settlement and Release* is a corrective action that should be used rarely and should not be a standard solution to a department’s failure to timely execute contracts or contract amendments. Departments may be cited for overuse of the *Settlement and Release* option during Quality Assurance visits or audits

Please see Policy Chapters for **Accounts Payable**, including **Commonwealth Bill Paying Policy**.

## **Assignment of Payments**

Pursuant to [M.G.L. c. 106, § 9-318](#), a contractor may freely assign payments under a contract to a third party. The third party receiving payment is called an assignee. An assignee is not considered a "contractor" and may not have a separate vendor code established for an assigned payment. All contract payments are due and owing to the contractor and the assignee has no legal right to make any claims to the department under the contract. The assignment of payments merely re-directs payments that have been lawfully earned and paid to the contractor to another address. All reports of payments and tax reporting are recorded for the contractor.

***A department MAY NOT establish a new vendor code or obtain a W-9 form or a Commonwealth Terms and Conditions from the assignee.***

1. The department must receive documentation from an authorized signatory of the contractor that the contractor agrees to assign payments to a third party assigned under a particular contract(s).
2. The department then submits to the Comptroller's Payee, Payments and Tax Reporting Unit a Vendor/Customer Modification Form (VCM) for the contractor with a MA-W9 to add an additional "payment address" (remittance address) with "Attn." or "c/o" or "payable to" and the assignee's name and payment address.
3. **The contractor's Legal Name, TIN and Legal Address MAY NOT be changed.** The department must also submit EFT (Electronic Fund Transfer) documentation (required for all payees unless a one-time payment or a hardship accepting EFT) as applicable to enable payments to the assignee electronically.
4. Payments are then made using the vendor code with this additional payment address. A department MAY NOT change the contractor's legal address to the address of the third party since the legal address is necessary for tax reporting purposes and the third party assignee should not get the contractor's tax forms.

The assignment of payments will be made on a contract-by-contract, and department-by-department basis and will not be made on a statewide basis for all payments due a contractor (unless approved by both OSD and CTR for a Statewide Contract). In the event a payment is inadvertently issued to the contractor, the department will have no obligation to "chase" the payment. The contractor will be legally obligated to forward that payment to the assignee. The assignee has no rights against the department under any assignment agreement or under any contract.

## **Internal Controls**

Under construction. Please see: [Internal Controls Procurement, Contracting, Bill Paying, Payroll](#).

## **Records Management**

In accordance with 815 CMR 10.00 the department is the record keeper of the official record copy of the contract documents and the contract/procurement file. MMARS is the official record of the encumbrance and payment documents and will supersede any paper copies of the same information. The contract/procurement file must contain, or refer to the location of, all documentation related to a procurement and resulting contract(s). Amendments for options to renew must be filed with the record copy of the contract. A department is responsible for retaining and archiving contract records in accordance with the disposal schedules issued by the Secretary of State Records Conservation Board. Please see Policy Chapter "**Contracts – Records Management**". See Policy Chapter on "State Finance Law and General Contract Requirement" for additional information on Procurement/Contract File content requirements.

## **Information Sources**

Related Policy:

[Key State Finance Law Compliance Appointments and Responsibilities](#)  
[Department Head Signature Authorization and Electronic Signature for MMARS Documents](#)  
[Contracts Policies](#)  
[Accounts Payable Policies](#)  
[Records Management Policies](#)  
[OSD Procurement Information Center \(PIC\)](#)

Legal Authority:

- [Expenditure Classification Handbook](#);
- [M.G.L. c. 7A](#) (Office of the Comptroller); [M.G.L. c. 29](#) (State Finance Law);
- [M.G.L. c. 110F](#) (Uniform Electronic Transactions Act); [M.G.L. c. 30, § 65](#) (Legal Services);
- [M.G.L. c. 29, § 29D](#) (Debt Collection); [M.G.L. c. 29, § 29E](#) (Revenue Maximization);
- [M.G.L. c. 30, § 27](#) (Revenue Receipt); [M.G.L. c. 10, § 17B](#) (Revenue Receipt); Massachusetts Constitution [Article LXIII Section 1](#) (Revenue Receipt);
- [M.G.L. c. 7, § 22](#) (OSD – Commodities); [M.G.L. c. 30, § 51](#); (OSD – Services) [M.G.L. c. 30, §. 52](#); (OSD – Services)
- [M.G.L. c. 29, §. 29A](#) (Consultants) (Level III – Executive only);
- [M.G.L. c. 29, §. 29B](#) (Human/Social Services) (Level III - Executive only)
- [M.G.L. c. 15A](#) and [M.G.L. c. 73](#) (state and community colleges);
- [M.G.L. c. 75](#) (UMASS); General or special laws governing expenditures;
- [Massachusetts Executive Orders](#) (Level III – Executive Only);
- [Administrative Bulletins](#) (Level III – Executive Only);
- [Comptroller regulations](#) (815 CMR 2.00 10.00);
- [M.G.L. c. 29, § 66](#) (State Finance Law Violations)
- [Comm-PASS](#)
- [Comm-PASS Policies](#)
- [801 CMR 21.00](#)
- [808 CMR 1.00](#)
- 

Attachments:

[MMARS transaction Records Management/Authorized Signature Form](#)

- [Employment Status Form](#) (must be completed for all Individual Contractors)

[Attorney General Review Form for Attorneys Providing Legal Services](#)  
[Attorney General Policy for Prior Review of Attorneys](#)  
[Quick Reference – State Grants and Federal Subgrants](#)  
[Quick Reference – Commodities and Services](#)  
[Quick Reference – Subsidies](#)  
[Quick Reference – Interdepartmental Service Agreements \(ISAs\)](#)  
[Quick Reference – Interdepartmental Chargebacks](#)  
[Quick Reference – Commodities and Services, Grants, Subsidies, ISAs and Chargebacks](#)  
[Commonwealth Terms and Conditions Form](#)  
[Commonwealth Standard Contract Form](#)  
[Commonwealth Terms and Conditions for Human and Social Services](#) (Level III - Executive Only)  
[Standard Contract Amendment Form](#)  
[Purchase Order for Commodities and/or Services](#)  
[Change in Contractor Identify Form](#) (Change in business structure or contract assignment)  
[Interdepartmental Service Agreement Form](#)  
[Subsidy Agreement](#)

For Standard Contracts for Construction (See Policy Chapters on Vertical and Horizontal Construction Contracts under construction)

For Standard Contracts for Real Property Leasing (See Policy Chapter on Real Property Leasing Contracts – under construction)

[Contractor Authorized Signatory Listing Form](#)

[Electronic Funds Transfer \(EFT\) form](#)

[Form W-9 \(Massachusetts Substitute W-9 Form](#) (if not listed as vendor in the MMARS Vendor Customer file)

[MMARS transaction Authorization/Records Management Form](#)

[Consultant Contractor Mandatory Submission Form](#)

- Contacts - [CTR Help Desk](#)

#### **REVISIONS**

- November 1, 2005 – Updates to reflect joint issuance of policy with OSD concurrent with launch of Procurement Information Center (PIC).
- **November 1, 2006** – Removed language referencing Knowledge Center and updated relevant links to Mass.gov/osc portal site.